Stealth Tort Reform

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The widespread call for “tort reform” over the past three decades is a calculated product of political rhetoric operating outside of the common law. The very phrase “tort reform” functions as a political symbol “in which both sides engage in lobbying and propaganda that contains some element of real problems, half-truths, and outright distortions.”¹ “Tort crisis,” “litigation lottery,” “lawsuit hell,” “mad dog lawyers,” “runaway juries,” “junk science,” “tort tax,”—all these phrases have been used to describe the present state of our civil tort system. Considerable scholarship has been directed toward debunking the basis for claims made by the tort reformers. For instance, Professor Marc Galanter published many law review articles aiming to expose the large gap between the claims and the facts underlying the tort reform rhetoric during the 1990s;² scholarly experts have documented that plaintiffs rarely win large judgments against corporations for defective products;³ the volume of products liability cases and medical malpractice cases


³  See, e.g., Audrey Chin & Mark A. Peterson, Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials (1985) (this early study used information from published jury reports in Cook County to compile the first, systematic statistical database on civil jury trials and verdicts); Stephen Daniels & Joanne Martin, Civil Juries and the Politics of Reform (1995) (utilizing broader geographic data bases); Brian J. Ostrom et al., A Step Above Anecdote: A Profile of the Civil Jury in the 1990s, 79 JUDICATURE 233 (1996) (drawing on the database maintained by the National Center for State Courts).
have not increased significantly; and, juries generally produce reasonable outcomes.\textsuperscript{5}

However, what has been called the “realist account”\textsuperscript{6} of the tort reform movement is not the subject of this Article other than to note that such scholarship has not stopped the movement’s proliferation.\textsuperscript{7} While such realist sociolegal scholars rely heavily on statistical studies to document how the tort reform campaign “radically distort[s] empirical truth about legal practice[,]”\textsuperscript{8} it is generally recognized that the rhetoric of the reform movement itself plays a major role in shaping public opinion and in thwarting further judicial expansion of the doctrine.\textsuperscript{9}

\textsuperscript{4} See generally DANIELS & MARTIN, supra note 3.
\textsuperscript{5} See id. (concluding that juries perform their functions reasonably well).
\textsuperscript{7} This Article is not concerned with the empirical battle in the sense of disproving the tort reformers; instead I take the position that, in the absence of studies allowing the conclusion that the reformers have drawn, common law should prevail. See, e.g., DANIELS & MARTIN, supra note 3, at 58, concluding: The rhetoric’s critics argue there is a substantial gap between the image portrayed in the rhetoric and what the best available evidence can tell us. This gap is much more a result of the political marketing of ideas tied to that political struggle over which image of the civil justice system will govern policy than it is a result of the limitations of the empirical literature. Viewed in this light, the interesting and troubling issue is not simply the fact that there is a substantial distance between rhetoric and empirical evidence, but that the image portrayed is accepted regardless of its veracity.
\textsuperscript{9} See Eisenberg & Henderson, supra note 8, at 792 (“More important than the reality of an insurance crisis is whether the American public generally perceived an insurance crisis and whether the perception was successfully tied to the products liability system in a way http://scholar.valpo.edu/vulr/vol42/iss2/1
These contemporary reformers, often funded by the constituents seeking to profit from their campaign, have succeeded masterfully in swaying public opinion as they seek to roll back the common law.10

When the critics of our common law tort system fail to achieve all the reform legislation they seek, they are increasingly successful in winning tort reform by stealth—they covertly manipulate our civil justice system and perhaps our perception of what is socially just.

II. THE “WHY” BEHIND THE “ORIGINAL TORT REFORM”

Strict liability in tort evolved during a time when three people were killed every hour of every day from household hazards: color television sets routinely caught fire; unglazed glass doors and walls sliced through vital organs causing disfigurement, paralysis, or death; hot water vaporizers reached scalding temperatures producing third-degree burns; furniture polish produced an epidemic of chemical pneumonia; dishwasher detergents contained pH values similar to values found in lye; circular saws maimed thousands; and, rotary lawn mowers routinely that could have reshaped opinion. It was; public perception of a 1980s insurance crisis is undeniable”).

10 See, e.g., FEINMAN, supra note 8, at 174-76 (noting the various coalitions of drug, oil, tobacco, insurance, chemical corporations, and trade associations funding the “conservative attack on the common law[,]” including the American Tort Reform Association (“ATRA”), the U.S. Chamber of Commerce, and the Manhattan Institute); HALTOM & MCCANN, supra note 6, at 45-49 (under the heading, “Financing Reform Advocacy”); Stephanie Mencimer, False Alarm: How the Media Helps the Insurance Industry and the GOP Promote the Myth of America’s “Lawsuit Crisis”, WASH. MONTHLY, Oct. 1, 2004, at 18. Mencimer documents the funding by business groups behind the media’s “We All Pay the Price” pro-reform campaign, and states:

One of the most influential of those groups is the Manhattan Institute, founded by the late CIA director William Casey. In 1986, the institute created its Project on Civil Justice Reform with funding from all the same insurance companies who’d been responsible for circulating bogus lawsuit horror stories. The project was targeted specifically at journalists. In a 1992 memo, institute president William Hammett explained the strategy, for molding reporters into a “pro-tort reform” position, “[j]ournalists need copy, and it’s an established fact that over time they’ll ‘bend’ in the direction in which it flows. For that reason, it is imperative that a steady stream of understandable research, analysis, and commentary supporting the need for liability reform be produced. If sometime during the present decade, a consensus emerges in favor of serious judicial reform, it will be because millions of minds have been changed, and only one institution is powerful enough to bring that about: the combined force of the nation’s print and broadcast media, the most potent instrument for public education—or miseducation—in existence.

Id.
sent a parade of patients holding bloody towels around lacerated or amputated hands or feet to emergency rooms across the United States every spring.\textsuperscript{11} In 1970, the President’s Commission on Product Safety reported that some twenty million Americans were injured each year as a result of incidents connected with consumer products.\textsuperscript{12} An additional seven million injuries were reportedly connected to industrial products.\textsuperscript{13} Men, women, and children suffered devastating injuries from unsafe products and neither negligence law nor governmental regulation was up to the task of promoting safer products.\textsuperscript{14} Thus, before assessing the validity of the contemporary tort reform movement, it is helpful to revisit the “why” behind modern products liability in tort.

Nineteenth century tort law protected the interests of defendants in general as well as particular categories of defendants.\textsuperscript{15} The principle of \textit{caveat emptor} as well as the doctrines of negligence and contract protected the merchants, reflecting a “new nation’s devotion to individualism and free enterprise.”\textsuperscript{16} The fault-based approach to liability for injuries caused by products was a reflection of the nature of society at large in the preindustrial era, when consumer transactions generally took place face-to-face; it also coincided with \textit{laissez faire} political philosophy and principles of individualism that were prevalent at the time.\textsuperscript{17} An injured consumer could only recover damages if it could be proved that the merchant or manufacturer engaged in unreasonable conduct. “Emerging industries and enterprises flourished under the protective cover of negligence principles.”\textsuperscript{18}

\begin{footnotes}
\item[13] See \textsc{The President’s Report on Occupational Safety and Health} (1972).
\item[14] See Alvin S. Weinstein et al., \textit{Products Liability: An Interaction of Law and Technology}, 12 DUQ. L. REV. 425, 462 (1974) (an early study of “new federal agencies for both occupational safety and product safety” and their effect on product safety, concluding that “these mechanisms [federal agencies], apart from the legal system, afford an incomplete basis for adjudication of legal and economic responsibility”).
\item[15] See, e.g., Lawrence M. Friedman, \textsc{A History of American Law} 467-87 (2d ed. 1985); Morton J. Horwitz, \textsc{The Transformation of American Law, 1780-1860} 67-108 (1977); G. Edward White, \textsc{Tort Law in America} 61-62 (1980).
\item[17] See 5 Fowler V. Harper et al., \textit{The Law of Torts} § 12.3 (2d ed. 1986) [hereinafter \textsc{The Law of Torts}] (noting that during the Industrial Revolution, society firmly believed that newly emerging industries deserved protection to promote expansion and that they would survive only if they were not burdened with all the losses that they actually caused. Fault-based negligence principles promoted this social policy).
\end{footnotes}
recovery developed from the often confusing overlap of contract and tort theory applied to actions involving consumers injured by products.  

Social values as well as economic policies supported the pro-merchant era, and it was not until the middle of the twentieth century that protectionist attitudes toward product defendants changed. Simultaneously, the recognition that negligence and contract principles afforded the consuming public insufficient protection from product related injuries emerged. In his concurrence in Escola v. Coca Cola Bottling Company, Justice Traynor asserted that, while negligence was not proven, it was unnecessary to prove, and further argued that “public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.” Thus, “the original tort reform” promoted social justice and product safety, evolving to rectify the harsh doctrines that barred consumers from recovery.

While this reform movement had its theoretical underpinnings in the doctrine of enterprise liability as set forth by Justice Traynor in Escola, it took an additional two decades for this theory to supplant contract principles as a basis upon which to recover damages for injuries and to control sources of products injury. Twenty years after Escola, a new era

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20 See THE LAW OF TORTS, supra note 17, at § 28.27 (commenting on the social justice underpinning of product liability doctrine, it notes, “[p]ublic policy goals undergirding the societal commitment to a notion of expansive manufacturer liability for defective products could not be effectively realized in view of the limitations inherent in negligence or implied warranty.”); Birnbaum, supra note 19, at 596; Roger J. Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 TENN. L. REV. 363 (1965).
21 Vargo, supra note 18, at 1202.
23 See Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 384 (1960) (wherein the New Jersey Supreme Court, prior to Greenman, eliminated the privity requirement in a breach of implied warranty action, holding that the manufacturer’s obligation is not grounded in the contract law of sales, but “upon the demands of social justice.”).
24 Escola, 24 Cal. 2d at 453.
25 MacPherson v. Buick Motor Co., 217 N.Y. 382 (N.Y. 1916). Judge Cardozo allowed Mr. MacPherson, who purchased his Buick from a local dealer not in privity with the manufacturer, recovery in negligence despite the contractual privity defense. Id. Similar cases were in the minority and limited to situations where it could be shown that the purchaser or intervening seller would not inspect for defects. Id. Although MacPherson was decided in 1916, it may be read today as a precursor of the strict liability standard enunciated later by Justice Traynor in Escola and Greenman. Decades would intervene while the contract approach generally prevailed. See, e.g., Joseph A. Page, Deforming Tort Reform, 78 GEO. L.J. 649, 653 (1990) ("Enterprise liability, which posits that a business or
for consumers commenced when, writing for a unanimous court in *Greenman v. Yuba Power Products, Inc.* Justice Traynor rejected warranty’s “timely notice” obstacle to the consumer claim, announcing that public policy demanded that the burden of accidental injury be placed on the entities who marketed them.\(^\text{n26}\) Strict liability in tort was born, and *Restatement (Second) of Torts*, Section 402(A) followed in 1965 providing:

>[T]he public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.\(^\text{n27}\)

Thus, strict products liability evolved at common law to implement an important social policy: to provide greater protection to the injured consumer than either contract or negligence law. Defendant manufacturers and sellers could no longer hide beneath the protective cloak of traditional contract or negligence principles. *Greenman* and Section 402(A) heralded the “original tort reform,” and the common law contours of this legal doctrine developed rapidly over the next two decades. Legal duties more stringent than those imposed by government regulation developed to protect consumers.\(^\text{n28}\)

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activity should bear the costs of the harm it causes, provided the major impetus for the shift from a negligence theory to a strict liability theory in products liability.”) (citations omitted); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (tracing the history of the doctrine as part of a conference addressing critical issues in tort reform at Yale Law School in 1984).

\(^{26}\) *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 63 (1963) (Judge Traynor wrote, “[t]he purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers . . . rather than by the injured persons who are powerless to protect themselves.”).

\(^{27}\) *Restatement (Second) of Torts* § 402A cmt. c. (1965).

\(^{28}\) See, e.g., *Bogus*, supra note 8, at 150-51 (arguing that while asbestos caused 170,000 deaths, the Environmental Protection Agency was never able to ban it, and lawsuits forced it from the marketplace); *Birnbaum*, supra note 19, at 593; *Weinstein*, supra note 14, at 462-63.
Deterrence is a major function of tort law, and the doctrine of products liability benefits consumers. “Primary among these benefits is the deterrent effect that it has on negligent behavior and unsafe products.” As Judge Posner has noted, “although there has been little systematic study of the deterrent effect of tort law, what empirical evidence there is indicates that tort law . . . deters.” Even those who question the level of deterrence in tort law concede that it delivers a “moderate amount of deterrence.” A primary social benefit of products liability tort law is deterrence to substandard conduct, or, put another way, an “incentive to beneficial conduct.” While the threat of liability

29 Webb v. Navistar Int’l Transp. Corp., 692 A.2d. 343, 346 (Vt. 1996) (stating that strict liability “protects the consumer . . . by creating an incentive for manufacturers to produce safe products, . . . or as other courts have stated, a deterrence to producing unreasonably dangerous products.”) (citation omitted); Gantes v. Kason Corp., 679 A.2d 106, 111 (N.J. 1996) (“[t]he goal of deterrence, acknowledged generally to be part of tort law, is especially important in the field of products-liability law . . . [t]his state has a strong interest in encouraging the manufacture and distribution of safe products . . . and, conversely, in deterring the manufacture and distribution of unsafe products . . . ”); West Am. Ins. Co. v. Oberding, 451 A.2d 239, 242-43 (Pa. Super. Ct. 1982) (noting the deterrent effect caused by product liability suits); Frank J. Vandall, Our Product Liability System: An Efficient Solution to a Complex Problem, 64 DENV. U. L. REV. 703, 710 (1987-1988) (“. . . our concept of strict liability has developed over time to make it easier for consumers to obtain compensation from manufacturers or sellers when injured by their products”).


31 Peck et al., supra note 8, at 436.


Yet between the economists’ strong claim that tort law systematically deters and the critics’ response that tort law rarely if ever deters lies an intermediate position: tort law, while not as effective as economic models suggest, may still be somewhat successful in achieving its stated deterrence goals

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Nevertheless, even if tort law is only moderately successful in deterring negligent conduct, this success has been largely unacknowledged by the realist critics and has a major bearing on any public-policy review of the tort system.


may not be the sole reason behind safety innovations, scholars note that it plays an important interactive role. Companies exhibiting “callous disregard for consumer safety have been hauled into court,” resulting in safer consumer products. Specifically, products liability doctrine promotes safer product containers, safer product handling, and, in particular, safer automobiles and pharmaceuticals. In 1983, the Rand Institute studied the “serious public policy problem, namely the manufacture of products that may have been unreasonably dangerous to their users[,]” to determine what external pressures had the greatest influence on promoting products safety and concluded, “[o]f all the various external social pressures, product liability has the greatest influence on product design decisions.”


36 Peck et al., supra note 8, at 438 (reviewing court cases involving the Ford Pinto and Chrysler minivan and documenting the companies’ “callous disregard for consumer safety”); Johnson, supra note 33, at 677. Johnson concludes:

Private personal injury lawsuits can help to control exposure to unsafe products in addition to compensating injured consumers and workers. Court decisions in these suits have played an active role in developing manufacturers’ legal duties to the public and in providing incentives for manufacturers to improve products and thereby avert future litigable injuries.


37 Johnson, supra note 33, at 677 n.2 (citing a series of cases forcing safer products).

38 See Graham, supra note 35, at 180 (citing a series of cases involving automobile safety); Peck et al., supra note 8, at 437 (“One industry in which consumers have clearly seen safety benefits derived from the tort system is the automobile industry.”).

39 See generally Judith P. Swazey, Prescription Drug Safety and Product Liability, in THE LIABILITY MAZE, supra note 35, at 293 (reporting that products liability laws and litigation have a “marginal effect” on prescription drug safety, but pharmaceutical manufacturers recognize that they can take steps to further contain risks and increase the safer use of their prescription products).

40 GEORGE EADS & PETER REUTER, DESIGNING SAFER PRODUCTS, CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION iii-viii (1983) (based on a study of large manufacturers of consumer products which developed corporate level safety offices after the 1960s).
Collectively, the doctrinal “why” behind the original tort reform reveals much about the social justice theory fueling the doctrine. While a rapid proliferation of unsafe products during the 1970s and early 1980s provided the social impetus for strict products liability in tort, the common law played a pivotal role in refining a doctrine providing incentives for manufacturers to improve the safety of their products. Broader civil justice goals of product safety and court access were major forces in development of the law. An early doctrinal basis for promoting these goals was enterprise liability, and scholars debated and disagreed on the “dominant” source of law for the dramatic changes taking place. Was the dominant strand risk-spreading or risk-deterrence? If “strict liability” meant something less than absolute responsibility and pure insurance, where did one draw the line?

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41 See, e.g., Madden, supra note 34, at 1096 (“[E]fficiency and corrective justice principles operate and will continue to operate in a beneficial symbiosis, each a check and a balance upon the other, with each as a necessary, but neither a sufficient, rationale for modern accident law objectives.”).
42 Johnson, supra note 33, at 692.
43 See Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453 (1960). The majority of the California Supreme Court utilized a somewhat tortured negligence approach to allow recovery for injury caused by an exploding Coke bottle. Id. In his concurrence, Judge Traynor set forth a more direct path to recovery, stating:

[It should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market . . . proves to have a defect that causes injury to human beings . . . .] Public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.

Id. at 440 (Traynor, J., concurring).
45 Gary T. Schwartz, The Beginning and the Possible End of the Rise of Modern American Tort Law, 26 GA. L. REV. 601 (1992); Gary T. Schwartz, Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice, 75 TEX. L. REV. 1801, 1810 (1997) (“Currently there are two major camps of tort scholars. One understands tort liability as an instrument aimed largely at the goal of deterrence, commonly explained within the framework of economics. The other looks at tort law as a way of achieving corrective justice between the parties.”). But see Priest, supra note 25, stating:

In my view, the contours of modern tort law reflect a single coherent conception of the best method to control the sources of product-related injuries. This conception, which its proponents called the theory of
However, while the debate raged concerning the parameters of the doctrine, no scholar seriously contested the legitimacy of promoting product safety or deterring substandard conduct. During this period of rapid doctrinal expansion, inquiry into its essential nature and a search for its proper limits continued. Professor John Wade articulated his seven factors; Professor James Henderson ruminated on the appropriate limits of manufacturer liability; Professor David Owen critiqued a catalogue of rationales behind strict products liability. An entire volume of The Journal of Legal Studies serves as a compendium of the search for the intellectual foundations of tort law in general, and in particular, for "strict liability in tort.

Despite debate among academics, court after court accepted the doctrine of enterprise liability. This doctrinal expansion took place in state and federal courts across the country under the guidance of the judiciary. While this Article does not advance the choice of one correct theory upon which to ground product liability law, it opines that the fact that the doctrine has been the subject of great debate among scholars and the fact that it expands and contracts is a reflection that the common law is alive and well and doing what it is supposed to do. The scope and volume of the debate indicates to this author that the experiential nature of the common law process worked well during the evolution of the original tort reform and that it developed exponentially, adjusting to changing societal norms and fostering the broad civil justice goal of promoting safe products.

enterprise liability, provides in its simplest form that business enterprises ought to be responsible for losses resulting from products they introduce into commerce.

Id. at 463 (citations omitted).

47 See Wade, supra note 44, at 837-38.
48 See Eisenberg & Henderson, supra note 8.
49 See Owen, supra note 16, at 529.
50 See Critical Issues in Tort Reform, supra note 44, at 459.
51 See THE LAW OF TORTS, supra note 17 (listing cases advocating risk distribution ). See, e.g., Priest, supra note 25, at 501; Madden, supra note 41, at 1034-55. Madden remarks that: [T]he decisional law with virtually no dissent repeats a deterrence role in accident law, without specifically assigning this result to the operation of either corrective justice or efficiency principles. When those disputing the vitality of a deterrence role achieved by decisions tracking corrective justice principles are largely academicians, I am inclined to side with the conclusions of judges who try the cases and read the records.

Id. at 1034-55 (emphasis added).
Given the unprecedented rapid proliferation of pro-consumer case law during the period of doctrinal expansion for strict liability in tort, it was not surprising that a pro-manufacturer backlash would ensue, and it did so under the skewed and misleading label of “tort reform.” However, this movement has taken place separate and apart from the common law and appears to be based on social policies antithetical to the policies underlying the “original tort reform.” Contemporary reformers have taken their cause to the court of public opinion and the very phrase “tort reform” has become a political tool used to manipulate the judiciary and the public at large by depicting our tort system as “a Mad Hatter world of avaricious lawyers, fluff-headed jurors, and permissive judges . . .” The lexical meaning of the phrase reveals that its use has extended beyond its historical meaning as reflected in the language of 402(A) of Restatement (Second) of Torts. The phrase now seems to serve as short hand rhetoric for any perceived attempt by injured consumers to invoke tort law.

Stealth tort reform operates to manipulate public perception about the state of the law without regard to truth or logic. It is not directed toward promoting social justice other than to “change perceptions of what the common good ought to be.” Most importantly, stealth tort reform is not interested in truth; unlike the common law, it persuades through assertive rhetoric and not through the give-and-take of orderly proof and argument, but through manipulation of images and ideas.

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52 See Page, supra note 25, at 654-55. Page states:

As history suggests, the old tort reform constituted but one swing of a pendulum that later began to reverse itself in the wake of the crises of the 1970s and 1980s. Thus, construed most favorably, the “new tort reform” has become an effort to eliminate alleged excesses perpetrated by the old tort reform and to restore equilibrium to the system. Despite their apparent similarities, there is an important difference between the old and the new tort reform. The former derived inspiration and major impetus from the ideas of scholars and had its primary influence on the courts. The latter is fueled by the economic self-interest of those who perceive themselves as adversely affected by the tort system. In essence, the new tort reform is a political attack on tort law in the legislative arena.

Id.

53 BOGUS, supra note 8, at 4.


III. ASSERTIVE RHETORIC AND CONTEMPORARY TORT REFORM

Our common law is designed to “seek the truth” by an orderly presentation of evidence in a court of law pursuant to rules developed over decades to ensure that all sides have a fair opportunity to be heard. Juries perform the function of factfinder, which is “to weigh the evidence and decide the truth of the matter.”

The common law places innate trust in the reasoned logic of citizen jurors. Reason, not passion, is the bulwark of our judicial system. However, “assertive rhetoric” is central to understanding the clandestine nature of the strategies used to manipulate public opinion while circumventing thoughtful application of the common law. In addressing the nature of such rhetoric, F. G. Bailey, in *The Tactical Uses of Passion, An Essay on Power, Reason and Reality*, discusses and dissects various modalities of persuasion and posits that our American culture champions persuasion based on reason over persuasion resulting from passion when seeking to find truth. With regard to the modality of persuasion through passion he writes:

> The . . . (direct use of passions) seeks to eliminate the mind and the critical faculties. It provokes feeling rather than thought. It is employed when the persuader suspects that the logical steps in the argument will not survive critical examination, or when he can find no shared value that will serve as the premise for an argument by reason. The appeal to emotion may be designed either to create such a shared value or to provoke a direct connection between feeling and action without the intervention of mind and its capacities for criticism.

“Assertive rhetoric” is the term Bailey uses to describe a passion-based method of persuasion “directed to ensuring that only one side of the question gets a hearing.” The reformers have masterfully engaged in a public relations campaign of assertive rhetoric which begs the question and is designed to ensure that “only” their side of the question “gets a hearing.” Their campaign has been assimilated into our culture to the point that very few recall the social and moral justifications for the

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58 *Id.* at 23.
59 *Id.* at 124.
original tort reform of the 1960s and 1970s. In his chapter, “The Rhetoric of Assertion,” Bailey summarizes:

In short, assertive rhetoric inescapably must proceed by begging the question: by simple assertion of the correctness of one answer to the question at issue. There is no other way of arguing about intrinsic values, for these are ends in themselves. The speaker asserts a truth by identifying the true believers who “happen” to be those who believe that truth. Accordingly, it is inappropriate to ask whether an argument advanced in this form of rhetoric is valid or invalid, and to test it by the rules of logic. The proper question to ask about assertive rhetoric concerns effectiveness. It is intended to provoke attitudes of approval or disapproval, to compel assent, to bring people over to one’s own side.

Bailey focuses on the rhetorical devices that are directed toward ensuring that only one side of the question gets a hearing, including: ethos, the invocation of authority, the uses of fright, the focus on personalities, and the significance of the vivid example. These heresthetical devises eliminate logic by structuring the dialogue (or lack thereof) so people will want to join the campaign or will feel forced by circumstances to align with the argument without question. While “logic” is concerned with the truth value of language, “rhetoric” and “heresthetic” are concerned with the persuasion and strategy value.

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60 See HALTOM & MCCANN, supra note 6.
61 See BAILEY, supra note 57, at 135-36.
62 See BAILEY, supra note 57, at 123-43.
63 RIKER, supra note 54. Writing in the political science arena, Riker invented the term “heresthetic[,]” stating:

“Heresthetic” is a word I coined from a Greek root for choosing and deciding, and I use it to describe the art of setting up situations—composing the alternatives among which political actors must choose—in such a way that even those who do not wish to do so are compelled by the structure of the situation to support the heresthetician’s purpose.

Id.
64 WILLIAM H. RIKER, THE ART OF POLITICAL MANIPULATION x (1986). Riker states: the traditional liberal arts of language are logic, rhetoric, and grammar . . . . Logic is concerned with the truth-value of sentences. Grammar is concerned with the communication-value of sentences. Rhetoric is concerned with the persuasion value of sentences. And heresthetic is concerned with the strategy-value of sentences. In each case, the art involves the use of language to accomplish some purpose: to arrive at truth, to communicate, to persuade, and to manipulate.
reformers strategize to obscure the truth by manipulating the game, by moving the battle from the court of law to the court of public opinion. This is the essence of tort reform by stealth.

The late William H. Riker, in many of his last writings, including his posthumously published *The Strategy of Rhetoric*, observes that “[t]he line between heresthetic (manipulation) and rhetoric (persuasion) is wavy and uncertain...”65 In conducting studies of communications in political campaigns, he concludes that “heresthetic and rhetoric are inseparably linked and must be analyzed together.”66 Contemporary tort reformers have masterfully maneuvered much of the reform debate to the political arena, discrediting the common law along the way. They have endeavored to re-shape public perception and the way the American public conceives justice. Law and society scholars have debunked the claims of the contemporary tort reformers. However, the attack on our civil justice system persists. The attack must be examined from a political perspective in order to distill perception from reality. Today’s reformers strategically rely on the heresthetic to ensure that their view—and only their view—gets a hearing, bypassing the due process safeguards in place in the law courts.

A. The Ethos of Stealth Tort Reform

1. Crisis Labeling and Fear Mongering

In a political context the content of the talk seems to be irrelevant, as is its logic and its responsiveness to issues and questions. It is as though any verbal display, especially if it is delivered with style and flair, encourages audiences to believe in the speaker’s competence and in his or her likelihood to deal with governmental issues in ways that benefit the audience. An occasional memorable or quotable phrase seems to be more persuasive than an argument that is empirically and logically impeccable and thorough.67

The contemporary “torts crisis” evolved not through empirically and logically impeccable arguments responsive to issues and questions, but as a result of reformers manipulating the public mood through strategic

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66 Id. at 10.
use of the media financed by business interests. Advertising strategies designed to influence the public mood were built around the “memorable phrase[,]” utilizing appeals to passion through advertising devices directed to ensuring that only one side of the question got a hearing. Manufacturers whose liability insurance premiums suddenly soared invoked the threat of danger and characterized the perceived problem as a “products liability crisis.” Hand-picked reports designed to show just one side of the story (“out of control” claims in which plaintiffs won large verdicts for seemingly small or nonexistent wrongs) produced positive results for their industry sponsors. Commentators soon noted that a “tort explosion” was undermining Corporate America. The crisis label rhetorically mandated a call to action, forcing the public to align without question. It spread rapidly beyond products liability until a full-blown “torts crisis” was perceived. Advocates of this mentality eventually succeeded in vesting the very term “tort reform” with a politically useful, if skewed, meaning.

The labeling of the situation as a “crisis” is yet another example of the heresthetic in which the structure of the argument compels “even those who do not wish to do so... to support the heresthetician’s purpose.” Indeed, the very term “crisis” invokes a threat that the public must rally around and face together. “More powerfully, perhaps, than any other political term, it suggests a need for unity and for

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68 See, e.g., MARK A. SMITH, AMERICAN BUSINESS AND POLITICAL POWER: PUBLIC OPINION, ELECTIONS, AND DEMOCRACY 194 (2000) (noting a strategic shift among business interests and stating, when it comes to unifying issues like tort reform, the most effective strategy involves shaping “public mood”).

69 See HALTOM & McCANN, supra note 6, at 39-46.

70 See VIDMAR, supra note 1, at 269 (commenting on plausible explanations for the “insurance crisis” such as “increases in legitimate malpractice claims or bad economic forecasting by liability insurers that forced them to raise insurance rates”); Jay Angoff, Falling Claims and Rising Premiums in the Medical Malpractice Insurance Industry, http://www.centerjd.org/ANGOFFReport.pdf (last visited Sept. 10, 2007) (documenting a correlation between poor industry investments and increasing med-mal premiums).

71 See, e.g., DANIELS & MARTIN, supra note 3, at 49 (documenting the media coverage of the “insurance or liability crisis” reported as “a new national crisis.”) (citations omitted).

72 Id. at 47 (documenting the use of the term “litigation explosion” in the media beginning in the mid 1980s and chosen as the title for Walter Olson’s book).

73 Id. at 49.

74 Id. at 651.

75 RIKER, supra note 54, at 9.
common sacrifice.” Such crisis labeling is a rhetorical tactic utilized for political blame shifting:

By calling a situation a crisis, and by identifying certain causes, the labeler can disavow responsibility for its occurrence and mask the true recurring nature of the so-called unique phenomenon. With respect to the insurance crisis, the problem may be rooted in the industry’s boom and bust cycle. By labeling the situation a crisis, however, the critics focus the debate on causes outside the industry itself.

In response to the rhetorically created crisis, the reformers garner public support in debating how to best engage in “crisis management.”

Playing on public fears of ever-elevating medical costs, the reformers turned to the issue of medical malpractice insurance, inciting fear that a rash of lawsuits would leave Americans without access to doctors or life-saving products. The reformers chose their rhetoric carefully; labels like “litigation mentality” and “lawsuit lottery” have considerable salience for Americans who value self-sufficiency, calling for a return to the days of personal responsibility where the public is cautioned to refrain from filing lawsuits.

A Newsweek cover story captures the rhetorical fear-mongering tactic wherein it warned, “Doctors. Teachers. Coaches. Ministers. They all

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76 MURRAY EDELMAN, POLITICAL LANGUAGE, WORDS THAT SUCCEED AND POLICIES THAT FAIL 45 (1977).
77 Id. at 45-47.
78 See Daniels, supra note 56, at 276.
79 EDELMAN, supra note 76, at 47 (stating that in response to a semantically created crisis, “crisis management” is a way to build public support).
80 See Bruce A. Finzen & Brooke B. Tassoni, Regulation of Consumer Products: Myth, Reality and the Media, 11 KAN. J. L. & PUB. POL’Y 523, 524 (2002). Finzen and Tassoni state: [The reformers] have endeavored to sell the public on the notion that the legal system has been overtaken by money-grubbing trial lawyers who manipulate junk science to demonize life-saving drugs and destroy the companies that make them.- They have also attempted to sell the public on the idea that a litigation explosion threatens to bankrupt the innocent, deprive the world of life-saving products, and line the pockets of plaintiffs’ lawyers with ill-gotten gains.- To sell the public on the idea that immediate reform must take place before society pays too great a price.

Id.
share a common fear: being sued on the job. Our litigation nation—and a plan to fix it”82 The article claimed that the country is suffering from an “onslaught of litigation” and featured tales in support of its claim that America’s desire to “win a jackpot from a system that allows sympathetic juries to award plaintiffs not just real damages . . . but millions more for the impossible-to-measure ‘pain and suffering’ and highly arbitrary ‘punitive damages.’”83 While a tremendous amount of empirical study contradicts many of the claims of the “crisis[,]”84 none of it was included in the Times or Newsweek stories. The graphic cover story appealing to fear and common sense simply illustrates the obvious, and the perception that follows is that, “[a]s a result of such dire consequences, the civil justice system needs change and people should, indeed must, support those changes.”85 It is not just the reformers that suffer from the crisis, but, as the insurance industry public relations campaign claims, “‘we all pay the price.’”86 This crisis-labeling is a symbolic and emotionally charged appeal to unexamined assumptions, and empirical data is not likely to defeat such claims.87 As Walter Olson, author of The Litigation Explosion,88 related in response to criticism that evidence of a litigation explosion was lacking—it’s the stories that really matter, not the empirical data.89


Media mogul, Steven Brill, first wrote about litigation myths in the media as early as 1986. He researched the archives of stories appearing in Time, The Economist, Forbes, and the television show 60 Minutes and found that many of the stories presented in support of what newscaster Harry Reasoner called a “litigation binge[,]” were simply urban

83 Id.
84 See supra notes 2-5 and accompanying text.
86 Mencimer, supra note 10, at 18; see also We All Pay the Price: An Industry Effort to Reform Civil Justice, 47 INS. REV. 58 (1986).
87 See Common Sense as a Cultural System, in CLIFFORD GERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 75 (1983) (stating that a common sense argument “rests its [case] on the assertion that it is not a case at all . . . . The world is its authority”).
However, these legends, whether fabrication or distortion of truth, mislead the public into thinking that they are representative of a class of cases, that they are typical cases, when in fact they may be aberrations. These stories take on a life of their own and catch on precisely because of their heresthetic appeal. Anthropologist and law professor, Robert Hayden, has hypothesized that such anecdotes persuade because they portray a threat important to the American cultural value of personal responsibility and tort reformers have utilized such assertive rhetoric to appeal to this moral value. Urban legends combine the moral imperative with dramatic examples that are easy to comprehend. Thus, contemporary reformers draw on American cultural norms and ideals, on what political scientist Deborah Stone calls “motherhood issues[,]” issues that everyone supports when they are stated abstractly. Urban legends serve as symbolic appeals to prejudice and unexamined assumptions. The tales are simply common sense illustrations of the obvious; if you believe in common sense, they must be true. In the words of F. G. Bailey describing assertive rhetoric, “they assert truths that they present as inescapable, defying argument, so essentially true that they are beyond the need for corroborating evidence.” The legends become fact and, as Bailey states, “[i]n rhetoric, to proclaim something a fact is to tell the audience that they have no alternative other that to give their assent, on pain of being excluded as crazy people.”

By the mid-1990s, reform rhetoric began to sway public opinion in a broader way by demonizing the personal injury trial lawyer. The rhetoric accused lawyers of everything from stirring up “[f]alse [i]llness[es]” to attempting to “bypass . . . democracy.”

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93 DANIELS & MARTIN, supra note 3, at 44 (recounting many of the urban legends such as the “The Pinto and the Horse,” “The Ladder in the Manure,” “The Drunk in the Phone Booth,” and “The Fat Man and the Lawnmower.”).
95 See Gertz, supra note 87.
96 BAILEY, supra note 57, at 125.
97 Id. at 132.
98 See generally OLSON, supra note 8; BAILEY, supra note 57, at 139 (noting that assertive rhetoric “tends to focus on persons rather than just on deeds”).
Contemporary reformers claim that “[p]ersonal injury lawsuits and other tort claims represent a $40 billion per year industry built upon the abuse and misuse of America’s legal system by contingency-fee lawyers.”\textsuperscript{101} By putting a personal face on the fear-mongering claims, those making the claims attach blame to the actor, encouraging the audience to make a judgment about the character of those doing the deed (the lawyers filing the lawsuits), rather than allowing the facts to speak for themselves.\textsuperscript{102}

This rhetoric of assertion is promoting a return to a traditional contract and negligence-based products liability system. The movement seeks to return the burden of accidental injuries caused by products to the consumer, insulating those who market them from liability—a repudiation of the doctrinal theory fueling the \textit{Restatement (Second) of Torts} and theories supporting post-Restatement expansion.\textsuperscript{103} Unlike the common law process out of which the original reform evolved, this political movement, by its very nature, does not invite discussion. A return to the moral imperative of individual responsibility is touted today by reformers seeking pro-business legislation. However, the rhetoric presents only one side of the issue and fails to address either product safety or business accountability:

By publicizing all the horrors of the tort system, they [the reformers] get a lot done. . . . You pass legislation that curbs their liability—that’s the ultimate prize. But short of that, you affect juries, you affect elected officials, you affect judges, you affect the entire discourse of the United States.\textsuperscript{104}

The success of the reform movement lies in the mindset of the judiciary and the public at large; however, much of the public at large no longer


\textsuperscript{102} See \textit{BAILEY}, supra note 57, at 139-40.


\textsuperscript{104} See Dan Zegart, \textit{The Right Wing’s Drive for ‘Tort Reform’}, \textit{THE NATION}, Oct. 25, 2004, at 18 (quoting Pamela Gilbert, a lobbyist for plaintiff’s lawyers).
remembers the policies that drove our legal system to implement the original Restatement.

IV. JURIES AND THE JUSTICE SYSTEM

Our common law legal system is based on principles and the rule of law. While formal legal rules define the causes of action and the legal procedures, the broader common law is shaped by the attitudes the jurors bring with them, not only when deciding an individual case, but also on future cases: “By casting its shadow over the negotiation and settlement process, the jury influences the actions of present and future litigants and their attorneys.”\(^{105}\) The result may be a manipulation of our underlying cultural assumptions or what anthropologist Robert Hayden calls our “common sense” concerning our civil justice system and how it works.\(^{106}\) The rhetorical threats to the American democratic way of life “may have affected potential jurors, who are, after all, consumers. The publicity may have influenced their decisions about damage awards for many years to come.”\(^{107}\)

Further, jurors themselves are affected and influenced by assertive rhetoric,\(^{108}\) and the heresthetic appeal to personal responsibility may be depriving litigants of a fair impartial trial.\(^{109}\) One researcher labels this “jury shadows[;]”\(^{110}\) another explains that, “[d]eliberating in the shadows . . . jurors often viewed themselves as responsible for returning

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\(^{108}\) See Hans & Lofquist, supra note 105, at 111-12 (finding this additional aspect of jury shadows in their study). Hans states:

Jurors themselves are affected and influenced by other juries’ decisions in a number of ways. The jurors we interviewed appeared to be quite cognizant of other civil juries, real and apocryphal. Their concerns about deep pockets, the litigation crisis, and the integrity of plaintiffs were implicitly and explicitly linked to the presumed excesses of antecedent juries.


moderation and good judgment to the civil justice system.” Stealth tort reform through manipulation of juror attitudes may have greater impact on our civil justice system than implementation of formal reform measures. The victim of this publicity may be our civil justice system and a plaintiff’s constitutionally-guaranteed right to a fair and impartial jury trial—tantamount to jury tampering wherein juries are conditioned to sympathize with one class of individuals. In fact, there is data supporting a thesis that the multi-million dollar rhetorical “crisis” aimed at manipulating public opinion has prejudiced juries against plaintiffs and has produced an observed pro-defendant trend.

Neil Vidmar conducted a comprehensive study of the civil jury in medical tort cases, concluding:

The widespread criticism of juries in medical negligence cases appears to be based on anecdotes and on findings from several studies of jury verdicts. The data from the studies do not allow the conclusions that have been drawn from them because very plausible alternative hypotheses that could explain the results cannot be ruled out. The methodological critique I have offered does not allow the inference that juries are doing a good job; it only says that the evidence does not allow us to say one way or the other.

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111 Hans & Lofquist, supra note 105, at 112.
112 Stephen Daniels & Joanne Martin, It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs’ Practice in Texas, 80 TEX. L. REV. 1781, 1802 (2002).
113 See, e.g., VIDMAR, supra note 1 (and accompanying text); Pavalon, supra note 109 (commenting on the effect of media campaigns on jury impartiality); Philip G. Peters, Jr., Doctors & Juries, 105 MICH. L. REV. 1453, 1484 (2007) (concluding that data show that juries consistently sympathize more with doctors who are sued than patients who sue).
114 See Eisenberg & Henderson, supra note 8, at 739. Eisenberg and Henderson state: The combination of dramatic increases in insurance rates [in the 1980s], widespread reporting of the insurance crisis, a multimillion dollar publicity campaign to link the insurance crisis to products liability rules, and such rules’ effects on daily life, may have created the kind of massive, widespread shift in attitude needed to produce the observed pro-defendant trend.
115 VIDMAR, supra note 1, at 226. Vidmar’s purpose was “to empirically examine the merits of the claims that malpractice juries deviate extensively from medical standards and that they are a primary culprit behind the ills that plague the American health care system.” Id. at 265.
While Vidmar urges caution in extrapolating his finding about malpractice juries to others such as products liability,\textsuperscript{116} he states emphatically that his findings should raise very serious questions about the reformers basic assumptions of jury behavior as well as their broad indictments of products liability juries.\textsuperscript{117} In the same year Vidmar’s study was published, Stephen Daniels and Joanne Martin published their study of juries based on data drawn from civil products liability and medical malpractice juries from different parts of the country. Daniels and Martin concluded, “We—and others—do not find empirical evidence of a system run amok with skyrocketing awards, and so on. Or, we find little or no empirical information available regarding many of the claims made by the reformers about juries and the civil justice system.”\textsuperscript{118}

V. VICTIMS AND LAWYERS

Contemporary tort reform rhetoric not only covertly threatens the right to an impartial fact finder in the jury box but may significantly restrict access to the civil justice system and may affect the size of the pool of lawyers willing to take on the injured consumer’s case. Jury researchers Stephen Daniels and Joanne Martin, in a study of the market effects of contemporary tort reform in Texas on legal practice, note, “changes in jury verdicts–real or perceived–reverberate throughout the civil litigation process because they help set the ‘going rate’ for settling claims.”\textsuperscript{119} The perceived jury attitude in turn affects the economic realities of private civil practice and, concomitantly, access to legal representation. Because plaintiffs’ attorneys are the civil justice system’s “gatekeepers[,]” their perceptions have a significant influence on the civil justice system.\textsuperscript{120} In their study, Daniels and Martin detail plaintiff lawyers’ perceptions of changes in the legal environment and separately assess the perceived effect of “formal legal changes”\textsuperscript{121} and of the “tort reform public relations campaigns.”\textsuperscript{122} The study concludes:

\textsuperscript{116} Id. at 274.
\textsuperscript{117} Id. at 273; see also Daniels & Martin, supra note 85, at 456-82 (detailing the effects of tort reform on jury attitudes and awards).
\textsuperscript{118} DANIELS & MARTIN, supra note 3, at ix-x.
\textsuperscript{119} See Daniels & Martin, supra note 112 (conclusions drawn from ninety-six in-depth interviews and 554 survey responses of plaintiffs’ lawyers in Texas).
\textsuperscript{120} See generally Herbert M. Kritzer, Contingency Fees Lawyers as Gatekeepers in the Civil Justice System, 81 JUDICATURE 22 (1997).
\textsuperscript{121} Daniels & Martin, supra note 112, at 1797.
\textsuperscript{122} Id. at 1802-03, Table 6a, Table 6b.
Interestingly, rather than changes in formal law, it is events which affect the broader legal environment that seem to have the greatest impact on plaintiffs’ practices. . . [T]he tort reform public relations campaign and the decisions of the Texas Supreme Court are perceived as having the greatest negative influence on plaintiffs’ lawyers’ practices, much more so than any . . . specific, formal legal changes . . . The state supreme court and the public relations campaigns impact the everyday working environment, in lawyers’ eyes, by affecting the jury or the jury pool. Perceptions about juries and jury behavior are central to the way plaintiffs’ lawyers perceive their working environment and construct their practices . . . . The public relations campaigns that have touted tort reform are seen as especially pernicious because of their supposed direct effect on the jury pool . . . and creating massive misinformation.\(^\text{123}\)

The perception of the gatekeeper to the civil justice system may play a greater role in shaping our civil justice system than any formal legal reform. This perception will determine whether, and for whom, the law will work in practice.\(^\text{124}\) It is the perceptions that rule: in the aftermath of three decades of assertive rhetoric, public opinion is under the perception that there is a tort litigation crisis and perception is manipulating access to legal process. Truth is irrelevant.

VI. THE JUDICIARY

A pro-defendant “quiet revolution” taking place in the courts was documented by Professors Henderson and Eisenberg based on product liability claims filed in 1990. Henderson and Eisenberg demonstrated that courts had begun to reject—or at least resist expansion of many of the doctrines underlying the “original tort reform.”\(^\text{125}\) Since that study, the judiciary continues to waiver on its commitment to original doctrinal underpinnings of products liability law. The judiciary is not immune to the forces shaping public opinion and the electorate. However, there are signs that the judiciary is retreating from its commitment to promoting

\(^{123}\) Id. at 1802.


\(^{125}\) See Henderson & Eisenberg, supra note 8, at 793.
safety through enforcement and/or expansion of products liability doctrine.

The first and foremost change in attitude emanated from the court where it all began, the California Supreme Court, signaling a significant retreat from Justice Traynor’s original thesis as expressed in Escola and Greenman. In Brown, a 1988 drug case, and in Anderson, a 1991 asbestos case, the court referenced the rhetoric of the defendants and made an about face on the “deterrence issue,” or from the point of view of the reformers, “overdeterrence.” The California court, once at the forefront of developing consumer protection law, adopted a liability standard more favorable to defendants than most other states. While only a small minority of jurisdictions exempt all prescription drugs from liability, the fact that the California Supreme Court is leading the rollback foreshadows a not-so-subtle change in judicial commitment to the safety enhancing doctrine underlying the “original tort reform.”

In Brown, the California Supreme Court held that strict liability would be inapplicable to all prescription drug failure to warn claims, reasoning that the holding was necessary on public policy grounds in order to avoid deterring drug manufacturers from developing and marketing new drugs and to foster reasonably priced prescription drugs. The court surmised that “if” drug manufacturers could not count on limiting their liability to risks that were known or knowable at the time of manufacture or distribution, they “might” be discouraged from

130 See generally Teresa M. Schwartz, Product Liability Reform by the Judiciary, 27 GONZ. L. REV. 303, 314 (1992) (for a discussion of reformers complaint of “overdeterrence” by a product liability system which is thwarting research and development of products and driving products off the market).
developing new and improved products. In support of these conjectures, the court relied on defendants’ rhetorical citing of a “host of examples of products which have greatly increased in price or have been withdrawn or withheld from the market because of the fear that their producers would be held liable for large judgments.” Significantly, the court also noted that the deterrence of strict liability with regard to prescription drugs was unnecessary and inappropriate because the Food and Drug Administration (“FDA”) plays a large role in screening new drugs before they are placed on the market, despite the realities of today’s FDA’s drug and medical device approval process.

In Anderson, an asbestos case, Justice Mosk, the California Supreme Court Justice who authored the opinion in Brown, wrote separately to criticize the majority’s reliance on Brown in extending its rule to non-prescription drug products, stating that the majority stretched the holding and analysis in Brown beyond all recognition when it relied on Brown in the asbestos litigation involving products other than prescription drugs. Significantly, Justice Mosk warned, “I must express my apprehension, however, that we are once again retreating from ‘[t]he pure concepts of product liability so proudly fashioned and nurtured by this court.’” However, despite Justice Mosk’s apprehension in

133 Brown, 751 P.2d at 479.
134 Id. at 479-80 (relying on E.R. Squibb & Sons’s claims that Benedectin was withdrawn from the market in 1983 because of the cost of insurance; that in the mid-1980s a producer of the diphtheria-pertussis-tetanus (DPT) vaccine withdrew its product from the market due to liability exposure and difficulty in continuing to obtain insurance; that unavailability of insurance prevented a manufacturer from marketing a new drug to treat vision problems). But see Robert E. Litan, The Liability Explosion and American Trade Performance: Myths and Realities, in TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE 127-49 (Peter H. Scheck ed., 1991) (reporting that the so called tort tax, even without factoring the benefits of promoting safety, is, at most, two percent).
136 See, e.g., Robert Adler, The 1976 Medical Device Amendments: A Step in the Right Direction Needs Another Step in the Right Direction, 43 FOOD DRUG COSM. L.J. 511, 530 (1988) (“Virtually all observers, including medical device manufacturers, share the view that the FDA’s resources are inadequate to meet its obligations under the Medical Device Amendments.”) (citations omitted); Medtronic Inc. v. Lohr, 518 U.S. 470-80 (1996) (commenting on inadequate resources in the FDA).
137 See Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 561 (Cal. 1991) (Mosk, J., concurring and dissenting). But see Carlin v. Superior Court, 920 P.2d 1347, 1351 (Cal. 1996) (five years later Judge Mosk wrote for the majority in a divided opinion rejecting defendants assertions that the standard for failure to warn involving prescription drugs is simple negligence).
applying Brown’s public policy rationale specific to prescription drugs, later courts extended it to products such as inflatable penile implants, prosthetic heart devices, and Intrauterine Devices (“IUDs”).

The California turnaround is perhaps the clearest example of a court’s willingness to accept the rhetoric of the reformers by reigniting in products liability law based on unexamined empirical claims. However, the unexamined public policy rhetoric of “overdeterrence” is seeping into other court opinions. For instance, the Utah Supreme Court relied on the public policy considerations of Brown in granting immunity from strict liability design defect claims to all prescription drugs approved by the FDA. The court granted the manufacturers immunity despite that fact that “not a shred of evidence has been presented to this Court that indicates that liability under the tort system has deterred pharmaceutical companies from introducing new drugs.”

Explanations for this changing judicial attitude may be a reflection of the change in public opinion; after all, judges as well as jurors and lawyers are part of the public at large influenced by the relentless assertive rhetoric of the past three decades. Alternatively, in states like California, where the judiciary is elected by a public bombarded with the rhetoric of the past three decades, it may be yet an additional example of

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138 See, e.g., Hufft v. Horowitz, 5 Cal. Rptr. 2d 377 (Cal. Ct. App. 1992) (applying the public policy rationale of Brown to an inflatable penile implant); Plenger v. ALZA Corp., 13 Cal. Rptr. 2d 811, 818 (Cal. Ct. App. 1992) (holding that, on policy grounds, no distinctions between prescription drugs and implanted drugs and IUDs existed); Stangvik v. Shiley Inc., 273 Cal. Rptr. 179, 190 n.6 (Cal. Ct. App. 1990) (“Although Brown dealt with the manufacture of prescription drugs, the policy may also be applied in the case of manufacturers of advanced medical innovations”).

139 See Bill Blum, Toward a Radical Middle: Has a Great Court Become Mediocre?, 77 A.B.A. J. 48 (1991) (citing California Supreme Court cases declining to expand plaintiffs’ tort claims).

140 See, e.g., Young for Young v. Key Pharmas., Inc., 922 P.2d 59 (Wash. 1996) (adopting the reasoning of Brown, holding that when the manufacturer of an unavoidably unsafe product fails to warn of its inherent defects, Comment k to Section 406A in Restatement (Second) Torts imposes liability for negligence only, not strict liability); Grundberg v. Upjohn Co., 813 P.2d 89, 95 (Utah 1991) (adopting a rule similar to Brown immunizing prescription drugs from strict liability design claims, but only if approved by the FDA); Enright v. Eli Lilly & Co., 570 N.E.2d 198 (N.Y. 1991) (citing Brown’s public policy favoring some protection for prescription drugs); Shackil v. Lederle Labs, 561 A.2d 511, 512 (N.J. 1989) (rejecting collective liability theory in claim based on defective design of DPT vaccine holding that it “would frustrate overarching public-policy . . . by threatening the continued availability of needed drugs and impairing the prospects of the development of safer vaccines.”).

141 Grundberg, 813 P.2d at 95.

142 Id. at 102-03 (Howe, J. dissenting).
the insidious nature of stealth tort reform manipulating the public today.\textsuperscript{143}

Public opinion is a construction of governments, of the media, and of everyday conversation influenced by governments and the media, although it is often accepted as if it were objective reality.\textsuperscript{144} The judiciary must be circumspect in making policy decisions based on rhetorical reality. The judiciary must demand more than assertive rhetoric as a basis for retreating from its traditional commitment to promote public safety through enforcement of products liability law doctrine.\textsuperscript{145}

VII. CONCLUSION

Stealth tort reform is changing our perceptions of the civil justice system in twenty-first century America, and contemporary reformers have masterfully conducted a political public relations campaign which begs the question, and is directed to ensuring, that only one side of the question gets a hearing.\textsuperscript{146} While it is tempting to challenge the rhetoric by debating whether its claims are legitimate,\textsuperscript{147} political scientists caution that questioning an argument's form is inappropriate and they urge that the proper question to ask about assertive rhetoric concerns its "effectiveness."\textsuperscript{148} If we accept this viewpoint, it is difficult to argue that the contemporary tort reform movement is ineffective and, as noted earlier, the extensive empirical work of the law and society scholars has done little to counter public perception. However, I posit that the legal question raised by stealth tort reform is not rhetorical. Thus, the question for debate is whether the contemporary tort reform movement promotes the social values underlying product liability law. Does it foster social justice?

This complex inquiry needs further study. On one hand, the reformers may be right; in the twenty-first century, perhaps we have returned to a culture privileging wealth maximization over individual

\textsuperscript{143} See OWEN ET AL., supra note 16, at 490 (noting that Brown was decided a few months after three liberal California justices were denied reelection and replaced by judges with more "moderate" views.).
\textsuperscript{144} See generally EDELMAN, supra note 67, at 52.
\textsuperscript{145} See generally Richard L. Abel, Questioning the Counter-Majoritarian Thesis: The Case of Torts, 49 DePaul L. Rev. 533 (1999) (urging courts to resist reforming the common law when applying tort reform legislation).
\textsuperscript{146} B AILEY, supra note 57, at 124.
\textsuperscript{147} See supra notes 2-7 and accompanying text.
\textsuperscript{148} See supra notes 2-7 and accompanying text.
rights and the enterprise liability doctrine fueling the original tort reform is no longer relevant. Although this explanation is beyond the scope of this Article, this thesis can be supported by the law and economic movement popular among tort scholars today, as well as erosion of strict liability doctrine embodied in the American Law Institute’s Restatement (Third) for products liability.\textsuperscript{149} However, if this is not the case, or at least has not been proven to be the case, the common law doctrine tells us that “the principle of fairness must have priority over the policy of wealth-maximization.”\textsuperscript{150}

The understanding of “fairness” in twenty-first century America must be debated in a common law context where all sides have an opportunity to be heard. Unfortunately, it appears that much of the public, unschooled in the virtues of the common law process, accepts the perception that America is in a “crisis” due to lawsuit abuse, that greedy trial lawyers are playing a lawsuit lottery, that courts are clogged with frivolous tort cases, that huge jury awards are responsible for skyrocketing insurance premiums driving doctors out of business, closing down schools sports programs, scaring the clergy out of counseling their flocks, and even thwarting research and development of products that society desperately needs. From these rhetorical assertions, it follows that the individual must take personal responsibility and that it is “unfair” to invoke tort law. However, in fairness, should not the shield of moral responsibility be applied equally to defendants’ injury causing behaviors? Should fairness to victims be at least as important as fairness to defendants, or have we as a society changed so dramatically that the doctrine of \textit{Escola} and \textit{Greenman}\textsuperscript{151} is no longer relevant?

What about product safety? In an age where federal regulatory agencies are unable to protect consumers from sophisticated products and corporate misconduct\textsuperscript{152} and where consumers injured by products


\textsuperscript{150} See, e.g., Gregory C. Keating, \textit{The Idea of Fairness in the Law of Enterprise Liability}, 95 MICH. L. REV. 1266, 1280 n.257 (1997) (citations omitted); Grundberg, 813 P.2d at 103 (Howe, J. dissenting) (wherein Judge Howe, after noting the lack of evidence in support of defendants’ over-deterrence argument, which the majority relied upon, asks, “[w]hy should those who are seriously injured or suffer because of the death of another have to stand the expense of such losses to support the high profit margins of the drug industry?”).

\textsuperscript{151} See supra notes 12-40 and accompanying text.

\textsuperscript{152} See, e.g., \textit{ADVISORY COMMITTEE ON THE FOOD AND DRUG ADMINISTRATION, FINAL REP.}, 11, supra note 136; BOGUS, supra note 8, at 150-51 (remarking that while asbestos causes
can no longer rely on federal or state health care because greater and greater percentages of the population are uninsured or underinsured. Is it fair for injured consumers to assume the costs of injury from products sold for profit in the marketplace? Are the social goals of promoting safe products less important than when the original tort reform evolved under the watchful guise of the common law? Do we now privilege the market place over social responsibility?

Under the common law, facts become “truth” only through the filter of the rule of law and upon application of the rules of evidence subject to rigorous cross examination designed to expose hyperbole, bias, and outright untruth. The “original tort reform” developed at common law, its foundation grounded in legal theory, however imperfect, evolved primarily to protect consumers from injuries caused by unsafe products, regardless of how the theorists would define “unsafe.” While judges and jurors are the voice of the common law, the voice of public opinion is “largely created by those who already wield the greatest power and is then used to rationalize their actions.” Today’s pro-defendant tort reform is a product of the common law’s antithesis with its foundation in assertive rhetoric—the heresthetic. It is a product of political manipulation. It is what Professor Feinman calls, “Politics by [o]ther [m]eans.” It is clear that much of today’s “truth” about products liability reform is a response to a semantically created political crisis; it is a result of a war of words taking place in the media rather than the courts. Its foundation is in impassioned rhetoric, often funded by the very constituents seeking to profit from its agenda. The real question concerning stealth tort reform is not simply whether the contemporary movement fosters social justice, but whether stealth tort reform has covertly manipulated perceptions of what is socially just.

170,000 deaths from lung cancer, the EPA was never able to ban it. Lawsuits forced it from the market).

153 Underinsured in America: Is Health Coverage Adequate?, KAISER COMM’N ON MEDICAID AND THE UNINSURED (2002) (“researchers estimate that about a fifth of insured individuals are underinsured”); FEINMAN, supra note 8, at 194 (commenting on decreasing forms of government protection, including health care).

154 See, e.g., GEORGE FISHER, EVIDENCE 1 (2002) (“We want juries to return the right verdict, and by that we may mean the truthful verdict, the one that accords with what happened.”).

155 See supra notes 42-50 and accompanying text.

156 EDELMAN, supra note 67, at 55.

157 FEINMAN, supra note 8, at 189.